

No. _____

05-578 OCT 31 2005

In the OFFICE OF THE CLERK
Supreme Court of the United States

LOUIS F. GILLIGAN AND GREGORY M. UTTER,
Petitioners,

v.

MEDTRONIC, INC.,
Respondent.

**On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Sixth Circuit**

PETITION FOR WRIT OF CERTIORARI

JOSEPH M. CALLOW, JR. JASON M. COHEN KEATING, MUETHING & KLEKAMP PLL ONE EAST FOURTH STREET SUITE 1400 CINCINNATI, OH 45202 (513) 579-6527	JOHN B. NALBANDIAN <i>Counsel of Record</i> ROBERT G. STACHLER GERALD J. RAPIEN TAFT, STETTINIUS & HOLLISTER LLP 425 WALNUT STREET SUITE 1800 FIRSTAR TOWER CINCINNATI, OH 45202 (513) 381-2838
---	--

Counsel for Petitioners

QUESTIONS PRESENTED

The Public Disclosure Bar of the False Claims Act, 31 U.S.C. §3730(e)(4)(A), bars *qui tam* law suits where the relator's claims are found to be "based upon the public disclosure of allegations or transactions" in certain public proceedings. The interpretation of that phrase has lead to confusion and inconsistency in the courts of appeals. The questions presented here are:

1. Whether this Court should resolve the current circuit split on the question of whether a *qui tam* lawsuit is "based upon" prior public disclosures and find that the Sixth Circuit erred in holding that such a *qui tam* lawsuit must merely be "supported by" and not derived from those prior public disclosures?
2. Whether this Court should resolve the confusion in the courts of appeals regarding when an "allegation" of fraud has been sufficiently made in a public disclosure such that the allegation can be said to form the basis of a later *qui tam* lawsuit, thereby barring the suit?
3. Whether this Court should resolve the confusion in the courts of appeals regarding when a "fraudulent transaction" has been publicly disclosed such that it can be said to form the basis of a later *qui tam* lawsuit, thereby barring the suit?

PARTIES TO THE PROCEEDING

Petitioners Louis F. Gilligan and Gregory M. Utter were the Relators-Appellees below and filed this *qui tam* action in the name of and on behalf of the United States. Respondent Medtronic, Inc. was the Defendant-Appellant below.

TABLE OF CONTENTS

Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Authorities	vi
Opinions Below	1
Jurisdiction	1
Statutes and Regulations Involved	2
Introduction	2
Statement of the Case	3
A. Factual Background and Proceedings Below	3
B. The False Claims Act's Jurisdictional Bar	6
C. The Sixth Circuit's Decision	7
Reasons for Granting the Writ	8
I. THE COURT SHOULD RESOLVE THE CIRCUIT CONFLICT AND CONFUSION OVER THE MEANING OF THE PHRASE "BASED UPON" AS USED IN THE "PUBLIC DISCLOSURE BAR" OF THE FALSE CLAIMS ACT	9

A. The Circuits Are Split On the Meaning Of "Based Upon"	9
B. This Court Should Reject the "Supported By" Interpretation	11
C. The <i>Qui Tam</i> Suit In This Case Was Not "Based Upon" Previous Public Allegations	15
II. THIS COURT SHOULD ADDRESS THE CONFUSION IN THE CIRCUITS REGARDING WHAT CONSTITUTES "ALLEGATIONS OR TRANSACTIONS" FOR PURPOSES OF THE PUBLIC DISCLOSURE BAR	16
A. The Sixth Circuit's Determination That Allegations Of The Fraud Alleged In This Case Had Been Publicly Disclosed Is Inconsistent With The Decisions of Other Circuits and With The Purpose of the Public Disclosure Bar	17
B. The Sixth Circuit's Determination That Fraudulent Transactions Had Been Publicly Disclosed Is Inconsistent With The Decisions of Other Circuits and With The Purpose of the Public Disclosure Bar	20
III. THIS CASE PRESENTS A RECURRING PROBLEM AND IS OF EXCEPTIONAL IMPORTANCE	24
Conclusion	26

Appendix

**Appendix A - Sixth Circuit Order Denying Rehearing
En Banc Dated August 2, 2005 1a**

**Appendix B - Sixth Circuit Opinion
Dated April 6, 2005 3a**

**Appendix C - District Court Order
Dated June 6, 2003 14a**

TABLE OF AUTHORITIES

Cases

<i>Avco Corp. v. Dept. of Justice</i> , 884 F.2d 621 (D.C. Cir. 1989)	24
<i>Cook County, Illinois v. United States ex rel. Chandler</i> , 538 U.S. 119 (2003)	24
<i>Cooper v. Blue Cross and Blue Shield</i> , 19 F.3d 562 (11th Cir. 1994)	10
<i>McKenzie v. Bellsouth Telecommunications, Inc.</i> , 123 F.3d 935 (6th Cir. 1997)	10
<i>Minnesota Ass'n of Nurse Anesthetists v. Allina Health System Corp.</i> , 276 F.3d 1032 (8th Cir. 2002)	10
<i>Saudi Arabia v. Nelson</i> , 507 U.S. 349 (1993)	14
<i>United States v. Bank of Farmington</i> , 166 F.3d 853 (7th Cir. 1999)	10
<i>United States ex rel. Biddle v. Board of Trustees of the Leland Stanford, Jr. Univ.</i> , 161 F.3d 533 (9th Cir. 1998)	10
<i>United States ex rel. Burns v. A.D. Roe Co., Inc.</i> , 186 F.3d 717 (6th Cir. 1999)	7
<i>United States ex rel. Doe v. John Doe Corp.</i> , 960 F.2d 318 (2d Cir. 1990)	10, 12

- United States ex rel. Dunleavy v. County of Delaware*,
123 F.3d 734 (3d Cir. 1997) 3, 13
- United States ex rel. Findley v. FPC-Boron Employees' Club*,
105 F.3d 675 (D.C. Cir. 1997) 3, 8, 11, 19
- United States ex rel. Fine v. Advanced Sciences, Inc.*,
99 F.3d 1000 (10th Cir. 1996) 10, 11
- United States ex rel. Foundation Aiding the Elderly v. Horizon
West Inc.*,
265 F.3d 1001 (9th Cir. 2001) 19, 22
- United States v. James*,
478 U.S. 597 (1986) 13
- United States ex rel. Jones v. Horizon Healthcare Corp.*,
160 F.3d 326 (6th Cir. 1999) 6, 9
- United States ex rel. LaValley v. First Nat'l Bank of Boston*,
707 F. Supp. 1351 (D. Mass. 1988) 13
- United States ex rel. Lujan v. Hughes Aircraft Co.*,
162 F.3d 1027 (9th Cir. 1998) 19
- United States ex rel. Marcus v. Hess*,
317 U.S. 537 (1943) 12, 14, 15
- United States ex rel. Mistick PBT v. Housing Authority of the
City of Pittsburgh*,
186 F.3d 376 (3d Cir. 1999) 10, 11, 14
- United States ex rel. Rabushka v. Crane Co.*,
40 F.3d 1509 (8th Cir. 1994) 22

United States ex rel. Siller v. Becton Dickinson & Co.,
21 F.3d 1339 (4th Cir. 1994) . . . 7, 10, 11, 13, 14, 15

United States ex rel. Springfield Terminal Ry. Co. v. Quinn,
14 F.3d 645 (D.C. Cir. 1994) 6, 16, 23

United States ex rel. Wisconsin v. Dean,
729 F.2d 1100 (7th Cir. 1984) 13

Statutes

28 U.S.C. § 1254(1) 1

30 U.S.C. § 3729, *et seq* 2

31 U.S.C. § 3730 2

31 U.S.C. § 3730(b)(4) (1982) 2, 12

31 U.S.C. § 3730(e)(4)(A) 2, 6, 7

RCW 7.72.030(2) 18

Other Authorities

*False Claims Act Implementation: Hearing Before the
Subcomm. on Admin. Law and Gov. Relations of the House
Comm. on the Judiciary*,
101st Cong., 2d Sess. 3, at 6 (1990) 20

S.Rep.No. 345, 99th Cong., 2d Sess.,
reprinted in 1986 U.S.C.C.A.N 13, 20, 24, 25

Vogel, *The Public Disclosure Bar Against Qui Tam Suits*,
24 Pub. Cont. L.J. 477 (1995) 15

PETITION FOR A WRIT OF CERTIORARI

Petitioners Louis F. Gilligan and Gregory M. Utter respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is reported at 403 F.3d 386, and is reproduced in the Appendix at 3a. The Sixth Circuit's decision denying Petitioners' petition for panel rehearing and suggestion for rehearing *en banc* is unreported and is reproduced in the Appendix at 1a. The district court decision denying Respondent's motion to dismiss is unreported and is reproduced in the Appendix at 14a.

JURISDICTION

The judgment of the court of appeals reversing the district court was entered on April 6, 2005. The judgment of the court of appeals denying Petitioners' petition for panel rehearing and suggestion for rehearing *en banc* was entered on August 2, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

31 U.S.C. § 3730 provides in part:

Civil actions for false claims

(e) Certain actions barred

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

INTRODUCTION

This case concerns the "Public Disclosure Bar" of the False Claims Act ("FCA"). Prior to 1986, the jurisdictional bar provision of the FCA, 31 U.S.C. § 3729, *et seq.*, barred *qui tam* suits that were "based on evidence or information the Government had when the action was brought." 31 U.S.C. § 3730(b)(4) (1982) (superseded). In 1986, Congress amended the FCA and enacted the present Public Disclosure Bar, which jurisdictionally bars *qui tam* actions that are "based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media." 31 U.S.C. § 3730(e)(4)(A). The subjectivity inherent in the terms "based upon," "allegation," and

“transaction” has caused much confusion and inconsistency in the federal courts of appeal. Indeed, as one court has stated:

Predictably, these jurisdictional provisions . . . have led to extensive litigation and to circuit splits concerning the meaning of the words “based upon,” “public disclosure,” [and] “allegations or transactions” Virtually every court of appeals that has considered the public disclosure bar explicitly or implicitly agrees on one thing, however: the language of the statute is not so plain as to clearly describe which cases Congress intended to bar.

United States ex rel. Findley v. FPC-Boron Employees’ Club, 105 F.3d 675, 681 (D.C. Cir. 1997); *see also United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 740 (3d Cir. 1997) (“The current version of the Public Disclosure Bar has generated a host of interpretive issues”).

This Court has not addressed the Public Disclosure Bar. This case presents an ideal opportunity for the Court to clear up that “confusion and inconsistency” because it requires the Court to resolve the acknowledged circuit split on one issue and clarify circuit court confusion on the other issues.

STATEMENT OF THE CASE

A. Factual Background and Proceedings Below

This case involves Medtronic, Inc.’s fraud on the United States Medicare System. Medicare only pays for medical expenses associated with the implantation of pacemakers and pacemaker leads that are approved by the Food and Drug